75-906

In the Supreme Court

of the United States

October Term, 1975

No. [illegible]

THOMAS J. WALSH, JR.
dba TOM WALSH & CO.,

Petitioner,

v.

E. A. SCHLECHT et al., as Trustees of Five Oregon-Washington Carpenters-Employers Trust Funds,

Respondents.

BRIEF OF PETITIONER

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OPINION BELOW

The opinion of the Supreme Court of Oregon is reported at 75 Or. Adv. Sh. 3326, 540 P.2d 1011.[1] It is also set forth in Appendix B to this brief.

[1] A single judgment and opinion was rendered by the Supreme Court of Oregon in the five cases, which had been consolidated for trial and all subsequent proceedings. The Respondents are all of the trustees (plaintiffs below) in each of the five cases. Petitioner was the sole defendant below in each of the cases.

JURISDICTION

The Supreme Court of Oregon in this case rejected a defense claimed by Petitioner under § 302 of the Labor-Management Relations Act of 1947, as amended (28 U.S.C. § 186). This Court has jurisdiction under 28 U.S.C. 1257(3) to review the judgment of the Supreme Court of Oregon by writ of certiorari.

The judgment of the Supreme Court of Oregon was entered on October 2, 1975. The Petition for Certiorari was filed December 24, 1975, and granted by this Court on March 1, 1976.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this case are § 302 of the Labor-Management Relations Act of 1947, as amended, now codified as 29 U.S.C. § 186. The full text of § 186 is set forth in Appendix "A" to this brief. The portions of it directly in point appear below.

> (a) It shall be unlawful for any employer or association of employers . . . to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value -----
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce;
>
> . . . .
>
> (c) The provisions of this section shall not be applicable . . . (5) with respect to money or

> other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families, and dependents, (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, that (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer . . . ; (6) with respect to money or other thing of value by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; . . . .

QUESTION PRESENTED

Does a Subcontractors Clause in a labor agreement, as applied to require a signatory employer to pay trust fund contributions on behalf of employees of a non-

union subcontractor who does not contribute to the trusts, violate § 302(c)(5) of the Labor Management Relations Act of 1947 (29 U.S.C. § 186(c)(5)), which prohibits employer contributions to trust funds unless they are established for the sole and exclusive benefit of employees (and certain relatives) of the contributing employer and employees (and certain relatives) "of other employers making similar payments?"

STATEMENT OF THE CASE

Petitioner builds and operates multiple-unit housing projects. He became the general partner in Tom Walsh 4, Oreg. Ltd., a limited partnership organized in 1971 to construct, own and operate a 56-unit, low income apartment project known as Oak Hill, in Salem, Oregon (A. 18-22; P. Ex. 3).

The Oak Hill project was financed and built under a subsidized rental program administered by the United States Department of Housing and Urban Development (HUD). Agreements with HUD required that employers on the project pay their workmen the prevailing "wages," including the cost of so-called fringe benefits, as provided in the Davis-Bacon Act, 40 U.S.C. § 276a (A. 26, 43).

The limited partnership acted as its own general contractor in constructing the Oak Hill project. It subcontracted the specialized carpentry work of framing the buildings to Lloyd Jackson (A. 24-25; D. Ex. B). Jackson's work was performed and the Oak Hill

project constructed in a 5-month period, June through November, 1971 (A. 44-45).

Jackson was a non-union employer (A. 43). Petitioner, however, was a signatory to a 1969 Memorandum Agreement with the Carpenters Union (P. Ex. 1, A. 73). It bound Petitioner, as an employer, to the terms of a collective bargaining contract called the Carpenters Master Labor Agreement between the Union and several employer associations (P. Ex. 4, 7), and to the terms of five Trust Agreements (P. Ex. 4). The Master Agreement requires signatory employers to pay a total of 96¢ per hour worked by carpenter employees into the five separate trust funds. (P. Ex. 7, 8).

Three of the trust funds (the Health and Welfare, Pension and Vacation Trusts) provide direct benefits to beneficiary workmen (A. 55-60; P. Ex. 4). A fourth trust supports apprenticeship training. The fifth trust, known as the Construction Industry Advancement Fund (CIAF), promotes the interests of the construction industry, generally (P. Ex. 4).

The Carpenters Master Labor Agreement in force during the 1971 construction of Oak Hill (P. Ex. 7, A. 78) contained as Article IV a Subcontractors Clause providing:

> "If an employer, bound by this Agreement, contracts or subcontracts, any work covered by this Agreement to be done at the job site of the construction, alteration or repair of a building, structure, or other work to any person or proprietor who is not signatory to this Agreement, the

employer shall require such subcontractor to be bound to all the provisions of this Agreement, or such employer shall maintain daily records of the subcontractors employes [sic] job site hours, and be liable for payment of these employees wages, travel, Health-Welfare and Dental, Pension, Vacation, Apprenticeship and CIAF contributions in accordance with this Agreement . . ."

Apparently relying on Paragraph 6 of the Memorandum Agreement signed by Petitioner (P. Ex. 1, A. 73),[2] the trial court treated Jackson's subcontract with the limited partnership as amounting to the same thing, for purposes of the Subcontractors Clause, as if Petitioner himself had contracted with Jackson (Finding of Fact 4, Conclusion of Law 1, A. 15, 16).

The Davis-Bacon Act, 40 U.S.C. § 276a, authorizes employers to pay certain so-called fringe benefits either to union-employer trusts for the benefit of workmen or directly to the workmen. Since Jackson was not a signatory to any collective bargaining contract or other agreement providing for him to pay contributions to the carpenters trusts funds, he did not make any payments for the benefit of his carpenter employees into the trusts (A. 49).[3] It is stipulated that

[2] That Paragraph provides in part:
"6. This Memorandum Agreement shall be binding on . . . the Employer regardless of a change of entity, name or association or joint venture and shall bind any entity or venture who is a principal, associated with the Employer. . . ."

[3] It is agreed that the trusts funds will not accept payments from an employer known not to be a signatory to any agreement requiring such contributions to the trusts. (A. 53, 54-55). As noted later, it would be a violation of § 302(c)(5)(B) for a union-employer trust to accept payments from an employer who is not a party to a written agreement providing for such contributions.

Jackson, instead, paid directly to his carpenter employees on the Oak Hill job an additional 96¢ per hour, equaling the amount which a union employer would have been required to pay to the Carpenters Trust Funds for the same work (A. 50).

More than a year after completion of the Oak Hill construction job, the Respondent Trustees of the five Carpenters Trust Funds commenced this litigation in the Circuit Court of Multnomah County, Oregon. Their complaints sought an accounting and a decree requiring Petitioner to pay contributions of 96¢ per hour, as specified in the Carpenters Master Labor Agreement, into the five Trust Funds for all hours worked on the Oak Hill job by Jackson's non-union carpenter employees (A. 4). The total contributions allegedly due to all five Trusts for the hours of these workmen on the Oak Hill project is $6,172.70, exclusive of penalties, interest and attorneys' fees (P. Ex. 8).

Since Jackson had already been paid for his subcontract work a fixed price which included the wages and fringe benefits paid by him to his non-union carpenter employees, the Trustees sought, in effect to impose upon Petitioner in this litigation liability for a second payment of the fringe benefit amounts already paid by Jackson directly to his workmen.

Petitioner's answer pleaded an affirmative defense

that the Subcontractors Clause of the Carpenters Master Labor Agreement violates 29 U.S.C. § 186, if interpreted and applied to require Petitioner to pay contributions to the Carpenters Trusts for the benefit of Jackson's employees (A. 12). The trial court sustained demurrers of the Respondent trustees to this defense (A. 14).

After the five consolidated cases were tried on other issues, the Circuit Court held that Petitioner was obligated by the terms of the Subcontractors Clause to make contributions of the benefit of Jackson's carpenter employees to the five Carpenters Trusts (A. 15). The Circuit Court, however, declined to require "double payment" by Petitioner in the form of contributions to the three Trust Funds which provide direct benefits to workmen, and entered a decree requiring Petitioner to contribute only to the Apprenticeship and CIAF Funds (A. 17).

The Trustees appealed to the Oregon Supreme Court from the Circuit Court's refusal to require contributions by Petitioner to the three direct-benefit Funds. Petitioner cross-appealed from the ruling of the Circuit Court which sustained the demurrers of the Trustees to his affirmative defense based on 29 U.S.C. § 186.

The Supreme Court of Oregon reversed the Circuit Court's refusal to require Petitioner to make contributions for Jackson's employees to the three direct-benefit funds. It also rejected Petitioner's cross-appeal, specifically holding that enforcement of the Subcon-

tractors Clause by requiring Petitioner to make contributions for the carpenter employees of the subcontractor Jackson to the five Trust Funds does not violate 29 U.S.C. § 186 (540 P.2d at 1014-1016; pp. 34-37, *infra*) .

Unless reversed by this Court, the Oregon Supreme Court's decision requires Petitioner to make contributions to all five Carpenters Trust Funds on behalf of the non-union carpenter employees of Jackson, the subcontractor, and to pay additional penalties, interest and attorney's fees.

SUMMARY OF ARGUMENT

The Subcontractors Clause of the Carpenters Master Labor Agreement, as construed and applied below, obligates Petitioner and other employers bound by it to make contributions to the Trust Funds on behalf of employees of non-contributing employers, and thereby conflicts with the requirement of § 302 (c) (5) of the Labor Management Relations Act of 1947, as amended (29 U.S.C. § 186(c) (5)) that such contributions must be for the benefit of employees of the contributing employer or of such employees jointly with the employees of "other employers making similar contributions." Lloyd Jackson was not an employer making similar contributions to the Carpenters Trust Funds. Enforcement of the Clause to require Petitioner to contribute to the Funds for the benefit of Jackson's employees therefore requires acts in violation of § 302.

The Subcontractors Clause, as so construed and applied in the context of projects subject to the requirements of the Davis-Bacon Act, 29 U.S.C. § 276a, also frustrates the purpose of that Act to prohibit unfair competition through some contractors having the benefit of lower wage rates. Enforcement of the Clause will make the cost of labor more expensive on a Davis-Bacon Act job if a contractor uses a non-union subcontractor than if he subcontracts work to a union employer.

ARGUMENT

A. The Subcontractors Clause, as construed and applied below, requires trust fund contributions which are illegal under § 302(c)(5) of the Labor Management Relations Act of 1947.

The Subcontractors Clause, as construed and applied by the Oregon Supreme Court, permits a labor union to penalize a union general contractor for contracting work to a non-union subcontractor. The penalty is in the form of requiring the general contractor to make payments on behalf of the employees of the non-union subcontractor to union trust funds from which the subcontractor's employees are legally ineligible to benefit.

Imposing a penalty for use of a non-union subcontractor appears to be precisely the intent of the Subcontractors Clause in the Carpenters Master Labor Agreement. Clauses prohibiting a union employer from subcontracting work to a non-union employer are common in the construction industry because of

the proviso in 29 U.S.C. § 158(e) allowing such "hot cargo" agreements in this industry.[4]

A recent survey of collective bargaining agreements in the construction industry found clauses requiring contractors to subcontract work only to union employers in about 75% of the agreements. U. S. Bureau of Labor Statistics, Department of Labor, Bull. No. 1864, "Contract Clauses in Construction Agreements," p. 25 (1975). Penalizing breach of such clauses by requiring contributions to union trust funds on behalf of non-union employees, however, appears to be somewhat unusual. Only one of many subcontractors clauses examined in a 1969 study contained that type of penalty. U. S. Bureau of Labor Statistics, Department of Labor, Bull. No. 1425-8, "Major Collective Bargaining Agreements," p. 23 (1969).

The penalty provided in the Subcontractors Clause of the Contractors Master Labor Agreement for use of a non-union subcontractor, however, requires contributions by the signatory employer which violate § 302 of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. § 186. That section prohibits payments by employers to union-employer trusts unless certain conditions are met. One of the requirements stated in § 302(c)(5) for legal payments by an employer to such a trust is that the trust fund must be

> "established by such representative, for the sole and exclusive benefit of the employees of such em-

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[4] *Cf. Connell Construction Co.* v. *Plumbers, Etc. Union*, 421 U.S. 616 (1975), involving such a clause not in a collective bargaining agreement.

ployer, and their families and dependents (or of such employees, families and dependents jointly with the employees of other employers making similar payments, and their families and dependents)."[5]

When the Subcontractor's Clause is applied to require a union contractor to make payments into the trusts for Jackson's non-union employees, the trusts and such payments are not solely and exclusively for the benefit of Petitioner's employees or for their benefit jointly with the employees of "other employers making similar payments." Jackson made no payments to these trusts for his employees (A. 49-50). The trusts will not accept contributions from any employer not signatory to an agreement requiring contributions to them (A. 53). There is no evidence that Jackson ever contributed to these trusts for any employee, or that any of Jackson's carpenter employees on the Oak Hill job ever worked for Petitioner or any other union employer required by contract to make payments for their benefit into these trusts.

It is clear that § 302(c)(5)(B) prohibited Jackson from paying contributions for his carpenter employees directly into the Carpenters Trust Funds, since he was not a party to any collective bargaining agreement or other written agreement providing for

[5] This requirement is also construed as applicable to § 302(c)(6), added to § 302 by a 1959 amendment. *In re Typo-Publishers Outside Tape Fund*, 344 F. Supp. 194, 196 (S.D. N.Y. 1972), aff'd 478 F.2d 374 (C.A. 2, 1973), cert. den. 414 U.S. 1002 (1973); *Blassie* v. *Kroger Co.*, 345 F.2d 58, 74 (C.A. 8, 1965).

such contributions. *Moglia* v. *Geoghegan*, 403 F.2d 110 (C.A. 2, 1968), cert. den. 394 U.S. 919 (1969).

In holding that § 302(c)(5) prohibits payments of benefits to the beneficiaries of a deceased employee whose employer had made contributions to a trust for many years without any written agreement providing for such contributions, the U. S. Court of Appeals for the Second Circuit in *Moglia* stated:

> "Only employees and former employees of employers who are lawfully contributing to a union pension trust fund may qualify as beneficiaries of a Section 302 Trust." (403 F.2d at 116)

Moglia followed two U. S. District Court decisions, *Rittenberry* v. *Lewis*, 238 F. Supp. 506 (E.D. Tenn. 1965), and *Bolgar* v. *Lewis*, 238 F. Supp. 595 (W. D. Pa. 1960), both denying pension fund benefits to former employees for whom the employer had made no contribution to the fund because of first becoming a signatory to the labor agreement after the plaintiff's retirement. After quoting § 302(c)(5), the Court in *Rittenberry* concluded:

> "It is apparent from the foregoing language that the trust [sic] authorized by Section 302 were for the payment of benefits to employees of employers lawfully making contributions to union welfare trusts." (238 F. Supp. at 509)

More recently, the U. S. Court of Appeals for the Second Circuit, quoting *Moglia*, held that payment of benefits from union-employer trust funds to employees of non-contributing employers is prohibited by

§ 302(c)(5). *In re Typo-Publishers Outside Tape Fund*, 478 F.2d 374 (C.A. 2, 1973), cert. den. 414 U.S. 1002 (1973). The same principle is stated in *Blassie* v. *Kroger Co.*, 345 F.2d 58 (C.A. 8, 1965), at 71, where the court holds that the subsection prohibits trusts from paying benefits to persons "who have never been in the active employ of a contributing employer or to those who, although having been in active employment, were not covered by employer contributions." See also *Crawford* v. *Cianciulli*, 357 F. Supp. 357, 369-370 (E.D. Pa. 1973).

Thus, employees of Jackson, a non-union and non-signatory subcontractor, could not lawfully be paid benefits from any of the Carpenters Trust Funds because they are not employees of an employer contributing the funds, as required by § 302(c)(5), and there is no evidence that they have ever been employees of any such employer. Contributions to the trusts by Petitioner on behalf of Jackson's employees would not, therefore, meet the requirements of § 302(c)(5) because they are not for the benefit of employees of "other employers making similar payments" to the Trusts.[6]

[6] Requiring contributions to the CIAF Trust (Case No. 389-038) would not violate § 302 if it is administered solely by employer representatives and does not, therefore, involve employer payments "to any representative" of employees. See *NLRB* v. *Brotherhood of Painters, etc.*, 334 F.2d 729, 731 (C.A. 7, 1964). Although the CIAF trust agreement (Pl. Ex. 4) authorizes selection of trustees solely by an employer association as trustor, there was testimony that all of the trusts in litigation have an equal number of management and labor trustees (A. 62).

If the CIAF Trust is subject to § 302 because of labor representatives serving as trustees, it would apparently be invalid as having purposes outside those specified in § 302(b)(5) through (8). *Local No. 2, Plasterers etc. Union* v. *Paramount Plastering, Inc.*, 310 F.2d 179 (C.A. 9, 1962), cert. den. 372 U.S. 944 (1963).

In holding that a trust benefiting persons other than employees of contributing employers violates § 302(c)(5), *Moglia* and the other decisions cited above appear to be in accord with the intent of Congress in enacting § 302. The principal purposes of § 302 were to remove funds intended to benefit employees from absolute control by union officials, and to ensure that the funds were used to benefit employees of the contributing employers. *Arroyo* v. *U. S.*, 359 U.S. 419, 425-426 (1959); *Bricklayers etc.* v. *Stuart Plastering Co.*, 512 F.2d 1017, 1024 (C.A. 5, 1975); II *Legislative History of the Labor Management Relations Act of 1947*, pp. 1304-1323.

Senator Ball, a chief supporter of § 302, stated in debate on the section that its

> "sole purpose . . . is not to prohibit welfare funds, but to make sure that they are legitimate trust funds, used actually for the specified benefits *to the employees of the employers who contribute to them*, and that they shall not degenerate into bribes. (II *Legislative History*, *supra* at p. 1305, emphasis supplied.)

The courts have recognized that strict enforcement of the requirements of § 302 was intended by Congress, as essential to carry out its purposes. As the Court of Appeals for the Fifth Circuit stated in *Bricklayers* v. *Stuart Plastering Co.*, *supra*:

"Section 302(c) is a narrow exception to the general prohibition of employer-employee payments contained in Sections 302(a) and 302(b). Strict compliance with the terms of Section 302(c) is required to settle a qualifying Taft-Hartley Trust. As Judge Waterman said in *Moglia* v. *Geoghegan*, 2 Cir. 1968, 403 F.2d 110, 115: '[a] reading of the legislative history of Section 302 shows that Congress intended to prohibit the establishment of any union funds by means of employer payments unless the funds conformed *in all respects* with the specific dictates of Section 302(c).'

Section 302 requires adherence, in the settlement of Taft-Hartley trusts, to a purposefully rigid structure of design to insure that employer contributions are made only for proper purposes and that fund benefits reach only proper parties. Senator Ball, one of the managers of this legislation in the Senate, aptly expressed the legislative purpose when he said that 'unless . . . such funds, when they are established, are really trust funds and are actually used for the benefit to employees specified in the agreement, there is very grave danger that the funds will be used for the personal gain of union leaders, or for political purposes, or other purposes not contemplated when they are established and that they will in fact become rackets.' 93 Cong. Rec. 4678 (1947). Judge Waterman reiterated this congressional concern, and the co-ordinate need for its strict judicial enforcement, when he said in *Moglia* that '[a]ny erosion of the strict requirements of the section could provide an unintended loophole for the unscrupulous, and could result in a diversion of funds away from the proper parties as had occurred before Section 302 was enacted.' 403 F.2d 110, 116." (512 F.2d at 1024-1025)

Moreover, § 302(c)(5) places on unions the burden to "establish" trust funds meeting the requirements of § 302. *Bricklayers etc.* v. *Stuart Plastering Co., supra*, 512 F.2d at 1020; *Local Union No. 529 etc.* v. *Bracy Development Co.*, 321 F. Supp. 869, 875 (W. D. Ark. 1971).

The Oregon Supreme Court appears to recognize that its decision in this case conflicts with the interpretation of § 302(c)(5) in *Moglia* v. *Geoghegan, supra.* At footnote 4, the Oregon Supreme Court states (540 P.2d at 1015, pp. 35-36, *infra):*

"We have not overlooked the statement by the Court in *Moglia* v. *Goeghegan* [sic], 403 F.2d 110 (C.A. 2, 1968) (at 116) that 'Only employees and former employees of employers who are lawfully contributing to a union pension fund may qualify as beneficiaries of a Section 302 trust.' It does not necessarily follow, however, that an employer may not make contributions to a trust fund under facts such as those involved in this case, at least when required to do so by the terms of a written agreement. In any event, as we read *Moglia*, that statement was not necessary to that decision in that case, in which there was no written agreement, and it is not binding upon this court in this case."

The Oregon Supreme Court relies on *Kreindler* v. *Clarise Sportswear Co.*, 184 F. Supp. 182 (S.D. N.Y. 1960), decided eight years before the *Moglia* decision

of the Second Circuit Court of Appeals. The District Court in that case held that an agreement requiring an employer to make contributions to trust funds in accordance with a formula based upon hours of his own employees, as well as hours of non-signatory subcontractors' employees, did not violate § 302. The facts and result were almost identical in *Budget Dress Corp.* v. *Joint Board*, 198 F. Supp. 4 (S.D. N.Y. 1961), aff'd 299 F.2d 936 (C.A. 2, 1962), cert. den. 371 U.S. 815 (1962).

The decisions in *Kreindler* and *Budget Dress* are distinguishable. The agreements there included payrolls of non-union subcontractors in calculating the amount of trust contributions required from signatory employers, but did not require contributions of the signatory employer to be for the benefit of or on behalf of the non-union subcontractors' employees. Neither does it appear that the subcontractors' employees were beneficiaries of the funds in those two cases. Unless so distinguished, *Kreindler* and *Budget Dress* appear to be inconsistent in principle with the later decisions of the Court of Appeals for the Second Circuit in *Moglia* and *Typo-Publishers*, *supra*.

The Subcontractors Clause in this case, unlike those in *Kreindler* and *Budget Dress*, requires employers bound by it to "be liable for payment of" contributions to the Carpenters Trusts, "in accordance with this Agreement," for the non-union subcontractors' employees. The Oregon Supreme Court paraphrased this Clause as obligating the signatory gen-

eral contractor to "be liable for payments to various trust funds *for the employees of*" carpentry subcontractors (emphasis supplied). 540 P.2d at 1015; p. 36, *infra*.[7] Thus, the Clause here does not merely measure the signatory employer's contributions on the basis of a subcontractor's payroll. It requires contributions for the benefit of the subcontractor's employees.

The Court of Appeals for the Second Circuit in *Typo-Publishers* also distinguished *Bey* v. *Muldoon*, 223 F. Supp. 489 (E.D. Pa. 1963), aff'd 354 F.2d 1005 (C.A. 3, 1966), cert. den. 384 U.S. 987 (1966), as involving a trust in unusual circumstances where it was difficult to determine whether the trust might illegally benefit any longshoremen who were never employed by the one stevedore employer contributing to the trust. 478 F.2d at 376.

B. The Subcontractors Clause, as construed and applied below, frustrates the purpose of the Davis-Bacon Act, 40 U.S.C. § 276a, to prohibit unfair competition based on some contractors obtaining cheaper labor costs than other contractors.

The decision of the Oregon Supreme Court in this

[7] It is possible to read the Subcontractors Clause as requiring Petitioner, the signatory employer, only to guarantee any contributions to the trusts otherwise due from a non-union subcontractor. *Cf.*, the similar clause in Para. 5 of the Memorandum Agreement (Pl. Ex. 1, A. 75-76). Such a gloss would avoid conflict with § 302, and require a decision in Petitioner's favor, because Jackson was not obligated to contribute to the Trusts. So read, however, the main purpose of the clause—to penalize a signatory employer for subcontracting work to a non-union employer—would be frustrated. Interpretation of a collective bargaining agreement is, of course, a matter of federal law. See, *e.g.*, *Clark* v. *Kraftco Corp.*, 510 F.2d 500, 506 (C.A. 2, 1975).

case also tends to frustrate the principal purposes of the Davis-Bacon Act, 40 U.S.C. § 276a.

The HUD agreements in this case subjected the Oak Hills project to the Davis-Bacon Act requirements that employers pay the "prevailing wages," including fringe benefits, to or for the benefit of all workmen on the job (A 26). That Act permits payment of fringe benefits either to union-employer trusts for the benefit of the workmen, or directly to the workmen. Since Petitioner's subcontractor, Jackson, was not a signatory to any agreement providing for him to contribute to the Carpenters Trusts, he could lawfully pay the fringe benefits only directly to his carpenter employees, in addition to their regular wages, and it is stipulated that he did so (A. 50).

The decision of the Oregon Supreme Court enforces the Subcontractors Clause by requiring Petitioner, as the general contractor, to pay the amount of the fringe benefits for Jackson's employees a second time through contributions to the Carpenters Trusts of the same amounts (96c per hour) that Jackson paid directly as fringe benefits to his carpenter employees. This means that a Davis-Bacon Act job will cost a contractor more to perform if he uses a non-union subcontractor than if he uses a union subcontractor who would, presumably, be bound by the Master Agreement and obligated to pay the fringe benefits to the trusts, rather than directly to his workmen.

In *International Union of Operating Engineers Local 627* v. *Arthurs*, 355 F. Supp. 7 (W.D. Okla. 1973), aff'd 480 F.2d 603 (C.A. 10, 1973), the Court states that the purpose of the Davis-Bacon Act

> "is to provide protection to local craftsmen who were losing work to contractors who recruited labor from distant cheap-labor areas." (355 F. Supp. at 8)

Instead of carrying out the purpose of the Davis-Bacon Act to eliminate unfair competition based on different labor costs of contractors (often due to non-union employers paying less compensation to workmen than union employers), the decision below interprets § 302 in a fashion which allows a collective bargaining agreement to make it more expensive for a general contractor on a Davis-Bacon Act job to use a non-union subcontractor than a union subcontractor. The extra expense to the general contractor imposed by the Subcontractors Clause for using a non-union subcontractor is the amount of the doubling or second payment of the fringe benefits which a non-union subcontractor will have paid directly to his employees, if the subcontractor is not a signatory to any agreement providing for them to be paid into union trusts.

CONCLUSION

The judgment of the Supreme Court of Oregon should be reversed, with directions to enter a judgment dismissing Respondents' claims against Petitioner.

Respectfully submitted,

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APPENDIX A

§ 302 of the Labor Management Relations Act of 1947, As Amended (29 U.S.C. § 186)

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act) employer in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: *Provided*, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with

respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insur-

ance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, or (B) child care centers for preschool and school age dependents of employees: *Provided*, That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: *Provided further*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; or (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: *Provided further*, That no such legal service shall be furnished: (A) to initiate any proceeding directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or

their officers or agents, in any matter arising under subchapter II of this chapter or this chapter; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959.

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

(e) The district courts of the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of Title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 17 of Title 15 and section 52 of this title, and the provisions of sections 101-115 of this title.

(f) This section shall not apply to any contract in force on June 23, 1947, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Compliance with the restrictions contained in subsection (c)(5)(B) of this section upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c)(5)(A) of this section be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.

APPENDIX B

Opinion of the Supreme Court of Oregon
75 Or. Adv. Sh. 3326, 540 P.2d 1011
(October 2, 1975)

No. 233—October 2, 1975

IN THE SUPREME COURT OF THE STATE OF OREGON

IN BANC*

SCHLECHT ET AL (as Trustees of the Oregon-Washington Carpenters-Employers Health and Welfare Trust Fund) (No. 389-034), *Appellants, v.* WALSH, *Respondent.*

SCHLECHT ET AL (as Trustees of the Oregon-Washington Carpenters-Employers Pension Trust Fund) (No. 389-035), *Appellants, v.* WALSH, *Respondent.*

SCHLECHT ET AL (as Trustees of the Oregon-Washington Carpenters-Employers Vacation Savings Trust Fund) (No. 389-036), *Appellants, v.* WALSH, *Respondent.*

SCHLECHT ET AL (as Trustees of the Oregon-Washington Carpenters-Employers Apprenticeship and Training Trust Fund) (No. 389-037), *Appellants, v.* WALSH, *Respondent.*

SCHLECHT ET AL (as Trustees of the Oregon-Washington Carpenters-Employers Construction Industry Advancement Fund of Oregon and Southwest Washington) (No. 389-038), *Appellants, v.* WALSH, *Respondent.*

Appeal from Circuit Court, Multnomah County.

CHARLES S. CROOKHAM, Judge.

Argued and submitted September 8, 1975.

Paul T. Bailey, Portland, argued the cause for appellants. With him on the briefs were Bailey, Doblie & Bruun, Portland.

Carl R. Neil, of Lindsay, Nahstoll, Hart, Duncan, DaFoe & Krause, Portland, argued the cause and filed the briefs for respondent.

AFFIRMED AS TO NOS. 389-037 AND 389-038; REVERSED AS TO NOS. 389-034, 389-035 AND 389-036.

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* McAllister and Denecke, Justices, did not participate in this decision.

TONGUE, J.

These five consolidated cases are suits in equity by the trustees of funds established under a labor-management contract against a general building contractor who signed that contract. The suits seek to enforce a provision of the contract that such a general contractor must either require that any nonunion subcontractor engaged by him be "bound to all of the provisions of this Agreement" or else maintain records for the subcontractor's employees "and be liable for payment" of contributions for those employees to the funds established by the agreement for health and welfare, pensions, vacations, apprenticeship and "construction industry advancement."

The nonunion subcontractor paid an amount equal to these "fringe benefits" directly to his employees in addition to their regular hourly wages, which equaled those required by the union contract. No payments, however, were made into the trust funds for any of these benefits.

The trial court held that defendant was required to make such payments to two of the trust funds, but not to the remaining three funds. The basis for that decision was that "it is inequitable" to require defendant to make payments which "amount to double fringe benefits" to the employees of the subcontractor (i.e., trust funds for health and welfare, pensions and vacations), but that "it is equitable" to require that defendant make payments to the last two funds (i.e., apprenticeship and "C.I.A.F."), as "funds which do not accrue benefits directly to the workmen."

Plaintiffs appeal from the decree in the three cases in which the trial court refused to require payments to those three funds. Defendant cross-appeals from the decrees in the two cases in which the trial court ordered defendant to make payments to the other two funds and also from the refusal of the trial court to allow attorney fees in the three cases.

In support of its appeal plaintiffs contend that upon finding that defendant was obligated by the terms

of his contract with the union to make "fringe benefit payments" to the plaintiffs for the employees of its nonunion subcontractor, the trial court erred in holding that as a court of equity it could, in effect, modify the terms of the contract by holding that defendant was required to make payments into only two of the five trust funds upon the ground that it would be "inequitable" to require payments to the remaining three trust funds.

The trial court recognized that "were I in law, having made the findings of fact, I would have no option but to grant judgment in all five cases for the trustees."

In *Wikstrom v. Davis et ux*, 211 Or 254, 315 P2d 597 (1957), we held (at 268) that:

> "Neither courts of law nor of equity have the right or power to make contracts for the parties, or to alter or amend those that the parties have made. It is the intention of the parties, manifested by their words, and not the whim of the court, that must be the guide in construing contracts by the parties thereto. • • •"

To the same effect, see *City of Reedsport v. Hubbard et ux*, 202 Or 370, 385, 274 P2d 248 (1954), holding, in a suit in equity, that:

> "• • • The court has no authority to read into said contract a provision which does not appear therein, nor to read out of it any portion thereof. And this is true, even though the result may appear to be harsh and unjust. The contracts of parties sui juris are solemn undertakings, and in the absence of any recognized ground for denying enforcement, they must be enforced strictly according to their terms. • • •."

In these five consolidated cases the trial court properly concluded that:

> "The labor contract required defendant to make fringe benefit payments to plaintiffs."

Nothing in the terms of the contract justified the court's requirement that payments be made by Walsh

to some of the trust funds, but not to all of them.[1] All the funds have equal standing under the terms of the contract. Payments due to each fund are calculated on the same hours worked per employee. The contract specifies identical legal remedies for failure to pay into any one fund or all of them.

Defendant contends that "the record in this case discloses at least innocent misleading of defendant and unclean hands," as well as laches, in that "the union officials failed to tell defendant until months after completion of the job that payment by Jackson [nonunion subcontractor] of fringe benefits directly to his men • • • would nevertheless leave defendant exposed for payment of the same sums into the trusts for the benefit of Jackson's carpenter-employees."

However, the testimony by defendant to support these contentions was contradicted by testimony offered by the union. The trial court rejected these contentions by its findings of fact and conclusions of law. After examination of the record, we agree with those holdings.[2]

Having so held, the trial court had no authority for "equitable reasons" to deny relief to the union in three of the five cases, while granting such relief in the remaining two cases. It follows that we must reverse the decree of the trial court in those three cases (cases No. 389-034, 389-035 and 389-036) unless we

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[1] The contract provided as follows:

> "If a contractor, bound by this Agreement, contracts or subcontracts, any work covered by this Agreement to be done at the job site of the construction, alteration or repair of a building, structure or other work to any person or proprietor who is not signatory to this Agreement, the contractor shall require such subcontractor to be bound to *all the provisions of this Agreement*, or such contractor shall *maintain daily records of the sub-contractors employees job site hours and be liable for payment of these employees wages, travel, Health & Welfare, Pension, Vacation, Apprenticeship and CIAF contributions in accordance with this agreement.*" (Emphasis added)

[2] This testimony and these findings are discussed further below in connection with defendant's cross-appeal.

conclude that defendant is entitled to prevail in his cross-appeal, as next discussed.

Defendant's first contention on cross-appeal is that the "Subcontractors Clause" of the Carpenters Master Labor Agreement violates 29 USC § 186, to the extent that it may be applied to require defendant to make contributions to union trust funds for the benefit of employees other than his own, as pleaded in defendant's Fifth Affirmative Defense in each of the five cases. The trial court sustained plaintiffs' demurrers to those affirmative defenses.

It is provided in 29 USC § 186 (a) that:

> "It shall be unlawful for any employer . . . to pay, lend, deliver, or agree to pay, lend or deliver, any money or other thing of value—
>
> "(1) to any representative of any of his employees who are employed in an industry affecting commerce . . ."

An exemption is provided in § 186(c)(5) for certain payment by an employer to trust funds, as follows:

> "(c) The provisions of this section shall not be applicable • • • (5) with respect to money or other thing of value paid to a trust fund established by such representative, *for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents)*: Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; • • •." (Emphasis added)

Defendant says that:

> "The net effect of 29 U.S.C. Section 186, with respect to contributions to trusts, is to prevent an employer from paying contributions to a trust for the benefit of anyone other than his employees or his employees as part of a pool with employees of other covered employers. The leading case on this point is *Moglia v. Goeghegan*, 403 F.2d 110 (CA 2, 1968), *cert. den.* 349 U.S. 919 (1969). • • •"

Defendant also cites other cases as following what he contends to be the rule as stated in *Moglia*.[3]

Defendant also says that:

> "The key point of *Moglia* and its progeny is that 29 U.S.C. Section 186 requires that the employer's payments must be for the benefit of his own employees. It is clear that the payments demanded by plaintiffs and awarded by the Circuit Court in two of these cases fail to meet the test of *Moglia*, because defendant Tom Walsh & Co. is being required under the Subcontractors Clause to make payments into the trusts for the benefit of persons who are employees of Jackson, and not his own employees."

As we read *Moglia*, however, the primary holding of that decision was that payments by an employer into such a trust fund must be made pursuant to a *written agreement*. (See 403 F2d at 115-16.) The same is true of most of the *Moglia* "progeny." This is in accord with the purpose of 29 USC § 186 to discourage corruption by prohibiting payments by employers to unions, except for those permitted in accordance with restrictions provided by that statute.[4]

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[3] The cases cited by defendant include: *In re Typo-Publishers Outside Tape Fund*, 344 F Supp 194 (SDNY 1972), *aff'd* 478 F2d 374 (CA 2, 1973), *cert denied* 414 US 1002 (1973); *Insley v. Joyce*, 330 F Supp 1228 (ND 111, ED 1971); *Pidgeon v. Brunswick Port Authority*, 324 F Supp 140 (SD Ga 1971); *Local U. No. 529, U. Bro. of Carpenters, etc. v. Bracy Dev. Co.*, 321 F Supp 869 (WD Ark 1971); and *Doyle v. Shortman*, 311 F Supp 187 (SDNY 1970). See also *Caporale v. Di-Com Corp.*, 345 F Supp 153 (ND 111, ED 1972).

[4] We have not overlooked the statement by the court in *Moglia v. Goeghegan*, 403 F2d 110 (CA 2, 1968) (at 116), that "Only employees and former employees of employers who are

In this case the requirement of such a written contract was satisfied in that defendant had a written contract with the union which required that he make contributions to the trust funds for his own employees and also specifically provided that in the event he engaged a subcontractor to do any work covered by the agreement he would be liable for payments into the various trust funds for the employees of such a subcontractor. None of the cases cited by defendant involves such a written contract provision.

In addition, as pointed out in *Kreindler v. Clarise Sportswear Co.*, 184 F Supp 182, 184 (SDNY 1960), also involving payments to a trust fund for employees of a nonunion contractor, in rejecting the defendant's contention that to qualify under 29 USC § 186 such payments must be for the sole and exclusive benefit of the employees of the employer making such payments, the court held:

> "• • • There is no basis • • • for the construction of the statute on which counsel for Clarise rely. The Funds are not set up employer by employer with the amounts contributed by each employer set apart for the benefit of his employees. They are of a type contemplated by the statute 'for the sole and exclusive benefit of the employees of such employer • • • (*or of such employees • • • jointly with the employees of other employees* [*sic*] *making similar payments* • • •)' (Emphasis added)
>
> "The construction of the statute contended for by counsel for Clarise would have most serious and unfortunate consequences. An employer whose employees were engaged in two crafts and who were members of two different unions could not lawfully contribute to the welfare fund of either

lawfully contributing to a union pension fund may qualify as beneficiaries of a Section 302 trust." It does not necessarily follow, however, that an employer may not make contributions to a trust fund under facts such as those involved in this case, at least when required to do so by the terms of a written agreement. In any event, as we read *Moglia*, that statement was not necessary to that decision in that case, in which there was no written agreement, and it is not binding upon this court in this case.

> because neither would be for the benefit of all of his employees.
>
> "The fact that the employees of Clarise's contractors cannot share in the payments based on their payrolls which Clarise has agreed to make does not give Clarise the right to avoid its agreement as illegal."

We agree with that statement.

See also *Bey v. Muldoon*, 223 F Supp 489, 495 (ED Pa 1963), *aff'd*, 354 F2d 1005 (3d Cir 1966), *cert denied*, 384 US 987 (1966); *Budget Dress Corp. v. Joint Board*, 198 F Supp 4 (SDNY 1961), *aff'd*, 299 F2d 936 (2d Cir 1962), *cert denied*, 371 US 815 (1962); and *Doyle v. Shortman*, 311 F Supp 187 (SDNY 1970).

The fact that these cases were decided prior to *Moglia* does not, in our opinion, mean that they are "not of value," as contended by defendant, not only because the decision is not binding upon this court, but because *Moglia* did not involve a subcontractor and there was no written agreement in *Moglia*, as in this case.

For these reasons, we hold that the trial court did not err in sustaining plaintiffs' demurrer to defendant's Fifth Affirmative Defense.

Defendant's second contention on cross-appeal is:

> "Union officials failed to give defendant any 30-day delinquency notice as required by the Subcontractors Clause as a condition to defendant's liability for contributions for the benefit of a nonunion subcontractor's employees. The Circuit Court erred in failing to sustain this defense."

In support of that contention defendant points out that Article IV of the labor agreement provides that the union will notify the employer "within thirty (30) calendar days of any delinquent payment" to the trust funds.

Defendant says that if any such payments were owed to the trust funds for Jackson's employees "they were due on the 25th of July, 1971 through the 25th

day of December, 1971" and that "the evidence set forth in the records shows that no notice was given of any delinquency in payments * * * until November 16, 1972 * * *."

To the contrary, however, the trial court found that:

"6. Defendant was notified by union officials and by their attorney of defendant's responsibility to pay fringe benefit contributions to plaintiffs as required by the union contract.

"7. Defendant was informed by union officials and by their attorney that if Lloyd Jackson did not make the required fringe benefit contributions to plaintiffs that defendant was required under the union contract to make said payments."

We have examined the record and find that it supports these findings, with which we agree. The contract does not require that written notice be given.[6] Several witnesses testified that before the project in question was started it was made clear to defendant that he was responsible for payments into the trust funds for the employees of the nonunion subcontractor. In addition, and perhaps of more importance, at least one of the union representatives testified that at subsequent conferences with defendant on or about August 2 and August 12, 1971, within 30 days of the completion of the project, the defendant was again told that as the general contractor he was responsible or "obligated" for payment of "these items," and that he was "requested to take care of his obligation."

While much of this testimony was denied by defendant and while it may not be as clear as might be desired, after reading the entire record and after according to the trial judge the benefit of his better opportunity to observe the demeanor of the various witnesses as they testified, as is usual in cases in which there is a conflict in the testimony, we agree with the findings of fact by the trial court. It follows that this assignment of error on defendant's cross-appeal must also be denied.

[6] The contract provides as follows:

"The Union agrees to notify the employer, person or proprietor within thirty (30) calendar days of any delinquent payment for wages, travel, Health-Welfare and Dental, Pension, Vacation, Apprenticeship and CIAF contributions owed by the subcontractor and to further issue a certificate to the employer when these payments have been made. (Clarification: With respect to fringes the 30 day period starts on the day after the report is due to the trust administrator.)"

Defendant's final contention on cross-appeal is that the trial court erred in denying payment to defendant for the attorney fees incurred by him in the three cases in which the trial court denied relief to the union. Because, however, we have reversed the decrees of the trial court in those cases it follows that we need not consider this contention.

For all of these reasons, we reverse the decrees of the trial court in cases Nos. 389-034, 389-035 and 389-036, and affirm its decrees in cases Nos. 389-037 and 389-038.